FILE COPY

Office - Supreme Court, U. S.
FEB 8 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 423

SHAWKEE MFG. COMPANY, *et al.*,
Petitioners;

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONERS

WILLIAM B. JASPERT,
Counsel for Petitioners.

bruary, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

SHAWKEE MFG. COMPANY, *et al.*, *Petitioners,* *vs.* HARTFORD-EMPIRE COMPANY, *Respondent.*	No. 423

REPLY BRIEF FOR PETITIONERS

Petitioners deem it necessary to comment only briefly upon the several points of argument in respondent's brief.

FIRST POINT.

The first point alleges lack of jurisdiction in the court below to grant relief by vacating its judgment and order procured by fraud upon that court. The cases cited by petitioner in its main brief (p. 20) dealing with judgments of district courts, established that a judgment can be set aside, after term. And the decisions in *Art Metal Works* v. *Abraham & Straus, Inc.*, 107 F. 2d 940 and 944 established that the same rule is applicable to courts of appeals.

The court below distinguished the *Art Metal* cases from the case at bar, by saying that a judge of the court had been corrupted in respect to that litigation, and that, therefore no competent mandates ever issued, hence the term time

was irrelevant. But in the *Hazel* case, the judgment of the court was likewise corrupted, by the Clarke article, it being evident from the court's own statements that it relied upon the Clarke article as establishing the basic status of the Peiler invention.

The judgment thus procured by poisoning the court's mind in serving up the fraudulent Clarke article, *which was not evidence* in the case, was as invalid as the judgment and mandate in the *Art Metal* cases. We, therefore, see no distinction between judgments procured by counsel's corruption of the court in one form or another. The House of Lords decision quoted in *Winslow* v. *Staub*, 242 F. 426, is in point, even though, as respondent alleges, the House of Lords may not have any terms such as are provided for by statute for the United States Circuit Court of Appeals. As said by the chancellor:

> "* * * all the commonest principles of justice compel this House *as they must compel any other tribunal*, to interfere to prevent its own decisions from being made the machinery for effecting a fraud or the machinery for effecting that which, if not done per incuriam, would have been a fraud * * *."

Respondent's contentions wholly ignore this Court's decisions in *United States* v. *Throckmorton*, 98 U. S. 61 and *Marshall* v. *Holmes*, 141 U. S. 589, discussed in our main brief.

SECOND POINT.

Respondent's second point, namely, that there was no fraud in the preparation and publication of the Clarke article or in its use in the Patent Office and the circuit court

of appeals, is reiterated throughout its brief. Respondent seeks to justify this assertion despite the documentary evidence consisting of the letters of Brown (R. 7), Carter (R. 7, 10), and Hatch (R. 10, 11), and the statements of Dorsey to the Patent Office (R. 8, Hazel, R. 92), by referring to the self-made evidence consisting of their affidavits (Hazel R. 51, 58, 91), made after these proceedings were instituted in the court of appeals below.

Respondent has not denied that the curve entitled "Production on Gob Feeders" of the chart in the Clarke article (Hazel, R. 176) is based on minimum royalties and not actual production. The chart, which purports to be comparative production curves by Owens and feeder machines does *not* show actual production by feeders, but only an estimate on the basis of minimum royalties, which had to be paid although nothing was produced (Hazel, R. 11). The comparison was false.

It is significant that Carter of Owens, who wrote Hatch about the production curves of the Clarke article (R. 10) and who, as the correspondence shows (R. 7, 10) worked with Hatch throughout the preparation of the article, failed to make any explanatory affidavit.

Aside from the question of the spurious authorship of the Clarke article, which is of itself a fraud, and its deliberate misrepresentations of the relative production of gob feeding vs. Owens suction feeding, it should be remembered that the article was allegedly based upon the proceedings of the Glass Bottle Blowers Asssociation and was prepared for the signature of the president of that Association who refused to sign it (Hatch, Hazel, R. 63). It was signed by Clarke, the president of the American Flint Glass Workers Union, an entirely different union from the Glass

Bottle Blowers Association, with which Clarke was not associated. Clarke was therefore unfamiliar with the proceedings of that Association, and could not have prepared the article, as respondent now alleges.

Among other discrepancies in respondent's statements (respondent's brief, p. 18) with reference to the Clarke article is that it

> "* * * dealt with machinery and methods that were in practical use, not with patents."

But it did deal with patents, because it refers by number and date to the United States Patent to Homer Brooke No. 723, 983, March 31, 1903. Further, it also intentionally omitted reference to the prior art Hitchcock gob feeding method, and patents which were referred to in the proceedings of the Glass Bottle Blowers Association (Hazel, R. 207). Under the date 1923, the Proceedings report:

> "Another matter that came to our notice relative to authentic production since we last met was the suit of the Hartford-Fairmount Company against the Schram Glass Company* for infringement of patent on what is called the gob process of dropping glass into a mould."

This patent was the early Hitchcock gob feed patent. As appears under the asterisk in this notation, the correct defendant was the United States Glass Company, and the case is reported in 2 F. 2d. 109.

In that case, Hartford was claiming that the Hitchcock patents covered gob feeding, and particularly suspended charge feeding, the very same thing that ten years later in the *Shawkee* case, Hartford asserted to be the method of the Peiler patent issued six years after the Hitchcock patents had expired.

Respondent's brief (p. 10) says that petitioners, with reference to that decision, erroneously stated that the plunger feeder of the Brookfield patent was in commercial use. But it was, as found by the court in principle like the accused Miller feeder. The opinion in the *United States Glass Company* case holds that the Brookfield patent discloses all the elements necessary for feeding separate gobs, as used by the Miller feeder.

Judge Buffington would not have said in the *Hazel* case that the Brooke flow and Owens methods constitute the entire prior art if respondent had included the Hitchcock patents and method of gob feeding in the Clarke article. But any reference to the Hitchcock method of gob feeding was intentionally excluded by respondent from the Clarke article, because it was the very purpose of the article to present the prior art as void of any gob feeding method.

THIRD POINT.

Respondent's third point is that petitioners had knowledge since 1933 of respondent's connection with the Clarke article. But, as said in our main brief, suspicion of respondent's connection with the Clarke article was not knowledge of the facts establishing the fraud, and these facts first became available to petitioners by the evidence adduced in the trial of the Government Anti-trust suit.

Shawkee did not know of Hartford's connection with the Clarke article until after the case had been argued on appeal.

Before decision, the matter was submitted to Judge Buffington by correspondence which ended abruptly by notice from the clerk (Hazel, R. 87), that the court would

receive no further communications after respondent's counsel had asked the court that the matter be dropped:

> "We feel that you must be heartily tired of the correspondence which has been submitted to you since this case was argued, and that unless you desire that we should specifically answer Mr. Barnett's last letter, we will not do so. I followed this course in respect to the last letter which he wrote to me, and of which he sent you a copy. It seems to us that Mr. Barnett's positions regarding the Glass Budget article have varied so much that you will not wish any further informal communications regarding it" (Hazel, R. 86).

If respondent had then believed, as it now asserts, that it had committed no fraud in connection with the Clarke article, it could and would have made a full disclosure of the facts to Shawkee's counsel and to Judge Buffington.

That Shawkee had no proof that the Clarke article was written by Hartford is further shown by the fact that in Shawkee's petition to this Court for writ of certiorari, filed April 3, 1934 No. 922 October term 1933, it referred to the lower court's reliance upon the unproven publications in the *Hazel* case, stating (Shawkee petition, p. 23):

> "The publications upon which the Court relies in this and other parts of the opinion are merely unproved, self serving declarations offered by respondent, where no opportunity was given to cross-examine the authors, and *whose authenticity was the subject of petitioners' motion for rehearing which was denied.*"

This Court denied the Shawkee petition, 292 U. S. 640, and later this Court denied two more petitions by Shawkee

for certiorari, in the same case, 293 U. S. 600 and 296 U. S. 635.

FOURTH POINT.

Respondent's fourth point that petitioners are barred from seeking relief, because they had voluntarily entered into a stipulation that the appeal from the granting of the preliminary injunction was to be considered as if on final hearing, is without merit.

Counsel for Shawkee believed that even above and beyond the decision in the *Hazel* case, Shawkee had a clear distinction from the Peiler patent based on the prior art Hitchcock patents. If the court below in the *Shawkee* case broadened its own prior decision, disregarding that prior art, that decision is none-the-less based upon the decision in the *Hazel* case and there was no election on the part of Shawkee either before or after the decision. No amount of testimony would have altered the fact that the Hitchcock patents disclosed the method of feeding employed by Shawkee.

FIFTH POINT.

Respondent's fifth point, that the judgment below was correct, because the alleged fraud did not prevent petitioners from making a full and fair defense is without merit. As we have pointed out in our main brief, the Hartford bill of complaint in the patent infringement suit against Shawkee made frequent reference to the Court of Appeals' decision in the *Hazel* case and falsely represented that the method of the Shawkee feeder was the same as the method involved in the *Hazel* litigation. Because the

Hazel decision was predicated upon the false Clarke article as determinative of the prior art, respondent's assertion of and reliance upon that decision had the effect of importing the Clarke article into the *Shawkee* case, in which the court of appeals said that reference to its decision in the *Hazel* case

> "* * * obviates needless restatement of the art".

As that "art" consisted largely of the Clarke article, and there was no independent consideration of the prior art in the *Shawkee* case, petitioners were thereby prevented from making a full and fair defense.

Not only did respondent's reference to the *Hazel* decision in the *Shawkee* case foreclose consideration of the prior art; namely, the Hitchcock patents upon which Shawkee had relied, but the opinion further evidences that the court below did not even understand the method and apparatus of the Shawkee feeder. The court said:

> "The present defendant, as its discharge or retard apparatus, uses a double acting diaphragm, which, actuated by compressed air, will discharge or retard the glass as desired." (*Shawkee Mfg. Co. et al.* v. *Hartford-Empire Company*, 68 F. 2d 726)

The diaphragm is not actuated by compressed air (as was the Hazel plunger), but is itself the actuator which produces positive and negative air pressures and is remote from the feeding apparatus. It is but an air pump, the same as shown in the Hitchcock patents, and it is not a clay plug that contacts the glass as in the Peiler patent.

The *Shawkee* decision further evidences that the court of appeals in the *Hazel* case did not consider the prior art on the merits including the Hitchcock patents, because it

would have recognized the Hitchcock principle to be inherent in the Shawkee feeder.

Petitioner's reference to the fact that the Shawkee method was not Hitchcock's, because Shawkee had made application for patent on its feeder fails to state that in the application for patent, the Hitchcock patents were referred to as disclosing the principle of the Shawkee feeder, the Shawkee feeder being asserted as having an improved control of the glass flowing from the melting tank to the feeder boot.

SIXTH POINT.

The sixth point of respondent's brief that the Shawkee complaint should not be dismissed on the authority of the *Keystone Driller* case is based on the contention that Hartford in fact, committed no fraud in connection with the Clarke article, and that the charge of unclean hands is completely negatived by the fact that not only was the Clarke article true, but Hartford's counsel believed it to be true and properly believed it to be Clarke's own article.

These statements find contradiction in the correspondence referred to in our main brief, for example, Brown's letter to Carter (R. 7) that such an article should be prepared *to make a record before the Patent Office* to induce the examiner to allow broad claims, and Carter's letter to Boshart (R. 7) that Hatch prepared it

> *"with the idea of getting it printed under the name of some apparently unprejudiced authority, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims,"*

These refute respondent's affidavits and its present contentions of innocence.

In *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541, the trial court, having had the benefit of observing the witnesses while testifying on the letters pertaining to the preparation and use of the Clarke article, said (p. 612):

> "This article was written by R. M. Hatch of Hartford, acting in conjunction with R. D. Brown of Hartford, and under the critical eye of V. M. Dorsey of Hartford and H. W. Carter of Owens."

CONCLUSION

The judgment below should be reversed and the relief granted as prayed for.

Respectfully submitted,

WILLIAM B. JASPERT,
Attorney for Petitioners.

February, 1944.